



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**CRIMINAL APPEAL NO. 114 OF 2018**

**(Being an appeal arising from Conviction and Sentence in Kitale Chief Magistrate's Court Csexual Offence Case No. 2 of 2017 delivered by Hon. P. Biwott Sernior Principal Magistrate on 27/12/18)**

**JOHN WAFULA OKUMU.....APPELLANT**

**VERSES**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. The appellant was charged with **the offence of Defilement of a child contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence was that **on the 1<sup>st</sup> day of January 2017 at [particulars withheld] village within Trans Nzoia County intentionally caused his penis to penetrate into the vagina of M. M. O a child age 13 years**.
2. The alternative count was **committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge was that **on the 1<sup>st</sup> day of January 2017 at [particulars withheld] village within Trans nzoia county intentionally caused the contact between your genital organ namely penis and the genital organ namely vagina of M M. O. a child aged 13 years**.
3. The Appellant was convicted and sentenced to 20 years imprisonment hence this appeal. The grounds contained in the petition of appeal are generally an assault on the entire evidence as per the evidence presented during trial. He argued that the same was not watertight enough to have sustained a conviction. When the matter came up for hearing the court ordered that the same be disposed by way of written submission which the court has gladly perused.
4. Before looking at the merits or otherwise of the appeal it shall be necessary to summaries the evidence as was presented during trial.
5. **The Complainant** gave sworn evidence and said that she was a class 6 pupil at [particulars withheld] academy and she was 11 years old. She said that on the material day she had been sent by her mother to get firewood from her neighbour. On the way she was waylaid by the Appellant who took or dragged her to a neighbour's toilet and forcefully took off her panty and defiled her. She said that this was around 7.00 pm and she could not scream as the appellant blocked her mouth using his hand.
6. In the process her mum came and rescued her and the Appellant was arrested as a result of her mother screaming. She was taken to the police station and later to the hospital where she was treated. Her age assessment was equally done. She said on cross examination that she knew the appellant and that it was not very dark.
7. **PW2 I N** the mother to the complainant testified that she had sent her to get firewood from her neighbour at around 7pm and she delayed in coming back. She then heard someone chocking and the girl came crying and the appellant came out of the toilet. She told her of what had happened and screamed for help and people came and apprehended the Appellant. The ladies who were present observed that she was bleeding from her vagina.
8. The Complainant was then taken to kitale hospital for treatment. The matter was reported at the police station where a P3 Form was issued and later filled. On cross examination she denied that the appellant had worked for her that day but on the contrary had worked at the neighbour of the witness.
9. **PW3 LNM** testified that the Complainant is a child to his neighbour whom he sold land to. That on the material day he was in his house when he heard screams at his gate and when he came out he found the appellant being attacked and beaten by a crowd and he stopped them. He helped in taking the Appellant to the police station.
10. **PW4 RNM** testified that he heard screams on the material day at around 7.30 pm and he rushed to the scene and found the Appellant

being pulled on the ground on an allegation that he had defiled the child. Those who were involved were PW2 and another woman.

11. **PW5 Peter Mbake** a clinical officer from Kitale County hospital examined the Complainant on the 3<sup>rd</sup> of July, 2017 and filled the P3 Form. He concluded that there was penetration and that she had contracted some sexually transmitted disease.

12. **PW6 Peris Silali** from Kitale District hospital undertook Dental Age assessment upon the minor and concluded that she was about 13 years old.

13. **PW7 PC Melvin Nabwire** from Kitale police station carried out investigation and preferred charges against the Appellant. She recorded witness statements as well as issuing them with the P3 Form.

14. When placed on his defence the Appellant gave unsworn evidence and called two witnesses. He said that on the material day he had worked for PW2 by smearing her house till 1pm when he left to watch football match. He then came for payment on 3<sup>rd</sup> but PW2 screamed and said that he had defiled the child. He was beaten by a mob and arrested. He said that she wanted to befriend him but he refused.

15. **DW2 PBO** testified that he was the chairman of Nyumba Kumi and he knew both the Appellant and PW2. He said that on the material day he had gone to watch a football match with the Appellant. The Appellant according to him had done some work of smearing the house for PW2 and he had gone in the evening to collect his pay. He then heard screams at Irene's home and he rushed only to find the Appellant being assaulted by some drunkards. He was accused of raping a child inside a latrine and according to him when they examined the latrine the same was too small for such offence to have been committed inside.

16. **DW3 JJO** testified that he was a brother to the Appellant and a neighbour to the Complainant. He said that on 1<sup>st</sup> July, 2017 they went to watch football match with the appellant till 6.00 pm when on the way he went to PW2 home to ask for his money. After about 2 minutes he heard screams emanating from PW2 house and he returned and found him being beaten and accused of defiling the child.

#### **ANALYSIS AND DETERMINATION.**

17. The court has perused the pleadings, the evidence as well as the exhibits produced herein. The court is aware that this being an appeal its duty is to re-evaluate the evidence as presented during trial and come up with a fresh and independent decision noting that it did not have the benefit the trial court had of seeing the witnesses and their demeanour during trial.

*(See Okeno vs. Republic 1972 EA at page 32)*

18. There are three ingredients of the offence now universally and generally accepted in this kind of offence, namely, the age of the victim must be established, the identity of the perpetrator as well as prove of penetration.

19. In regard to the age of the complainant, she testified that she was 11 years old but the dental age assessment concluded that she was 13 years old. This in my view was conclusive in the absence of any other physical document for instance the birth certificate.

20. As regards the question of penetration, the Complainant explained how the Appellant defiled her by removing her panty and inserting his penis into her vagina. She said that she was not able to scream as he blocked her mouth. Her mother then came and helped the situation.

21. The same was corroborated by the medical documents produced which included the P3 Form and other treatment documents. The child was apparently seen after 3 days although the matter was reported on 1<sup>st</sup> July 2017. I have perused the said medical documents and it is beyond doubt that she was defiled. The clinical officer concluded that she may have been infected with some sexually transmitted diseases.

22. It's instructive to note that there were other injuries on the thighs sustained by the Complainant which were found by the Clinical Officer. This head or ground was thus proven by the Respondent.

23. Did the Appellant commit the offence? Much has been said by the Appellant's counsel and in particular that she was not truthful in her testimony. There was no eye witness to the incident. PW2 only arrived as the child came out of the toilet crying. The Appellant was also at that toilet and this caused her to raise alarm after being told by PW1 what had transpired.

24. The line of argument taken by the Appellant and his witnesses placed him at the scene. He did not deny the same. They all said that he had gone to ask for his dues after working for pw2 during the day. The said evidence by the appellant was not subjected to cross examination as it was unsworn. It is therefore difficult to establish the truth or the veracity of the same.

25. If he had worked for her, what were the terms of the work and why did he choose to come and demand the pay in the evening and not 1.00 pm when he completed the work? Who else saw him smearing the house that day? These and other questions remained unanswered as the Appellant choose to give unsworn evidence which had no probative value.

26. I thus placed the Appellant at the scene. There was no case of mistaken identity. All the parties as well as the Appellants own witnesses did not contest the question of mistaken recognition because of lack of sufficient light. In any event it was not contested that the Complainant did not know the Appellant.

27. There was the submission by the Appellant's Counsel that the child could be untruthful. Looking at the line of her evidence the court is unable to agree with him. The appellant on the contrary raised an allegation that he had rejected PW2's advances to befriend him and that is why he fixed him using the child. In the absence of cross-examination that position remains one sided and of no much value to the

Appellant.

28. The evidence by DW2 and DW3 may not be of much help as they cannot explain what happened between the time they left the appellant to go and get his money from PW2 and the period they heard the screams. All that the confirmed was that they found him being assaulted and accused of defiling the minor.

29. The Appellant had issues with the findings by the Clinical Officer that the Complainant contracted some STD. Looking at the P3 form the same in my view cannot be termed a conclusion as it states "**possible venereal infection-candidiasis**".

30. It was not therefore conclusive. In any case there was no requirement that during examination the presence of the Appellant was necessary or that the police and the medical personnel must expect the presence of the suspect as is being submitted by the Appellant's Counsel.

31. Consequently I find that the three ingredients of defilement were established and this court agrees with the findings of the trial court. The appeal is therefore dismissed.

**Dated, signed and delivered in open court at Kitale this 6<sup>th</sup> day of June, 2019.**

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**H. K. CHEMITEI**

**JUDGE**

**6/6/19**

**In the presence of:**

**Mr Bororio holding brief for Kiboi for the Appellant**

**Mr Omoria for State**

**Accused - present**

**Court Assistant Emily**

**Judgment read in open court.**